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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 705

UNITED STATES OF AMERICA, PETITIONER

v.

HARRY FLORIAN, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ANTON FLORIAN, DECEASED BENEFICIARY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above entitled case October 16, 1940.

OPINIONS BELOW

The District Court for the Northern District of Illinois rendered no opinion. The opinion of the Circuit Court of Appeals in dismissing the appeal (R. 39–43) and its opinion in revoking the judgment of dismissal and reversing on the merits (R. 47–51) are reported in 114 F. (2d) 990.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 16, 1940 (R. 51). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether compensation accruing to a World War veteran after he has become totally permanently disabled may be used under the provisions of Section 305 of the World War Veterans' Act to revive his lapsed war risk term insurance where such compensation was uncollected on the date of the death of the veteran.

2. Whether the fact that no issue was raised between the Government and an insured during his lifetime as to whether he was totally permanently disabled, precludes a defense to a claim for the revival of lapsed insurance under Section 305 that the insured became totally permanently disabled at a time when no compensation was due him.

3. Whether an order denying a recovery under one of several counts upon a single war risk insurance contract is appealable where it recites that the "other counts remain for disposition."

STATUTES INVOLVED

Section 305 of the World War Veterans' Act, June 7, 1924, as amended, as contained in U. S. C., Title 38, Section 516, provides, in part:

> Where any person has heretofore allowed his insurance to lapse, or has canceled or reduced all or any part of such insurance, while suffering from a compensable disability for which compensation was not collected and dies or has died, or becomes or has become permanently and totally disabled and at the time of such death or permanent total disability was or is entitled to compensation remaining uncollected, then and in that event so much of his insurance as said uncollected compensation, computed in all cases at the rate provided by section 302 of the War Risk Insurance Act, as amended December 24, 1919, would purchase if applied as premiums when due, shall not be considered as lapsed, canceled, or reduced; and the Veterans' Administration is hereby authorized and directed to pay to said soldier, or his beneficiaries, as the case may be, the amount of said insurance less the unpaid premiums and interest thereon at 5 per centum per annum compounded annually in installments as provided by law.

Other pertinent statutes, together with a bulletin of the Treasury Department, and a letter from the Administrator of Veterans' Affairs to the Solicitor General, appear in the Appendix, *infra*, pp. 18–25.

STATEMENT

This suit was originally brought in the District Court of the United States for the Northern District of Illinois by Anton Florian, the beneficiary under a

$10,000 war risk term insurance contract issued to his son, William G. Florian, to recover benefits under the contract (R. 2–5). The plaintiff died and the respondent, Harry Florian, as executor of Anton Florian, was substituted as party-plaintiff (R. 24). The petition, as amended (R. 9–14), and an additional count (R. 14–18), contained claims for insurance benefits based on three inconsistent grounds. Those alleged in the amended petition were (1) that William G. Florian, the insured, was totally and permanently disabled on May 20, 1919, while his insurance was in force by premium payments (R. 12), and (2) that on an unspecified date, after the insurance lapsed in 1919, he became totally and permanently disabled under conditions which revived and matured his insurance by operation of Section 305 of the World War Veterans' Act (R. 11). The ground of the third, or additional count, was that the insurance was revived and matured under Section 305 upon the death of the insured on May 21, 1924 (R. 14, 17), no mention being made of total permanent disability.

The Government answered, denying the material allegations in the amended petition, except those relating to the issuance of the insurance (R. 19–20), and, as to the additional count, alleged, *inter alia,* that the insured became totally and permanently disabled on or before October 22, 1923, at a time when he was not entitled to any disability compensation, and that the compensation which

accrued thereafter and remained uncollected at the time of his death was inapplicable to revive the insurance (R. 21).

Respondent moved to strike these allegations in the answer to the additional count, and also moved for a summary judgment under that count (R. 25).[1] The District Court entered an order denying both motions (R. 25–28) after considering stipulations of the parties and evidence offered at the hearing on the motions (R. 25). The court, in an amended order (R. 32–33), expressly reserved for future determination upon evidence to be adduced the issue as to whether the insured became totally permanently disabled in October 1923, as alleged by the Government.[2] The plaintiff excepted to the order of the District Court (R. 33) and took an appeal therefrom (R. 34).

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[1] No question as to whether the insured was totally permanently disabled on the date alleged by the Government is now presented since the fact was, of course, necessarily conceded for the purposes of the respondent's motions to strike and for summary judgment, and hence must be taken as true for all present purposes.

[2] The court made findings of fact (R. 25–28) substantially in accord with the facts alleged or admitted in the answer to the additional count, except that it made no finding with respect to the allegation that insured became permanently totally disabled for insurance purposes in October 1923, at a time when he was not entitled to any disability compensation. These findings included a finding (R. 27) that in August 1932 an agency of the Veterans' Administration had made an administrative determination that the insured became totally and permanently disabled in October 1923.

The Circuit Court of Appeals dismissed the appeal on motion of the Government, on the ground that it lacked jurisdiction because the order appealed from was not a final decision nor the kind of interlocutory order from which an appeal would lie. The court, however, in its opinion, expressed the view that upon further proceedings in the District Court a final order appealable by the respondent might be entered as to the additional count without disposing of the other counts (R. 39–43).

Shortly after this decision of the Circuit Court of Appeals, the District Court, on motion of the respondent, entered an order purporting to correct its original order *nunc pro tunc* to recite, in effect, that respondent elected to "stand by" his motions, and that the court thereupon found the issues as to the additional count in favor of the Government, and directed that the suit be dismissed as to that count only, and that the other counts "remain for disposition" (R. 45–46). A certified copy of this order was filed in the Circuit Court of Appeals pursuant to a stipulation that it might be included in the record on appeal (R. 44–45). Respondent thereupon filed in the Circuit Court of Appeals a petition for rehearing (R. 46). The Government filed an answer to this petition (R. 46–47).[3]

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[3] The answer, not copied in the record, was a joinder in the respondent's petition for rehearing and a petition that in any event the previous opinion be modified. The position of the Government in this answer, not fully reflected in the court's subsequent opinion (R. 48), was that no appealable

The Circuit Court of Appeals thereupon vacated its order dismissing the appeal and denied a rehearing (R. 47), and, without modifying its former opinion,[4] reversed the "orders or judgments" of the District Court with directions to enter judgment for respondent (R. 51). The court expressed the view in its opinion (R. 49–50) that "there would be merit" in the Government's defense—that compensation accruing to a veteran after he has become totally permanently disabled may not be used to revive his insurance under Section 305—if an administrative adjudication that the insured became totally and permanently disabled on October 22, 1923, had been made before his death or if he himself had claimed such disability. The court held, however, that such a defense would not lie under "any reasonable construction of the Act," where, as here, no such claim has been made by the insured or by his personal representatives and no issue had been made by the Government with respect to his physical condition on the date in question until long after his death. The court suggested that, although the fact is not controlling, it would be difficult for a beneficiary after the

judgment could be entered upon the additional count unless it constituted a final disposition of the entire case, that the court had erred in its previous opinion in expressing the view that an appealable order could be entered upon the additional count without disposing of the remaining counts, and that the previous opinion should be modified in this respect.

[4] See footnote 3, *supra*.

death of the veteran to meet a contention by the Government that he was totally permanently disabled and, hence, that it would be unfair for the Government to make this defense unless the veteran had claimed, or the Government had found during his lifetime, that he was so disabled. Conceding in its opinion that there were no cases in point, the court relied upon *United States* v. *Ellison,* 74 F. (2d) 864 (C. C. A. 4th), certiorari denied, 295 U. S. 750, and *United States* v. *Sellers,* 75 F. (2d) 623 (C. C. A. 5th), certiorari denied, 295 U. S. 763, as supporting its holding by analogy.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that compensation accruing to a World War veteran, after he has become totally permanently disabled, may be used under the provisions of Section 305 of the World War Veterans' Act to revive his lapsed war risk term insurance.

(2) In holding that a right to insurance benefits under Section 305 may arise upon the death of an insured who had previously become totally and permanently disabled at a time when no disability compensation was due him.

(3) In holding that the Government may be precluded from asserting that an insured became totally and permanently disabled at a time when no disability compensation was due him, if no issue as to his disability was raised by or with the Government until after his death.

(4) In holding that the order of the District Court, as finally amended *nunc pro tunc,* was appealable.

(5) In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals is opposed to the long-continued administrative practice of the Veterans' Administration and its predecessor, the Veterans' Bureau. According to a letter from the Administrator of Veterans' Affairs to the Solicitor General, dated January 14, 1941 (Appendix, *infra,* pp. 22–23), Section 305 of the World War Veterans' Act, 1924 (*supra,* pp. 2–3), has been consistently administered as making no provision, under any circumstances, for revival of insurance by compensation accruing subsequent to the total permanent disability of an insured.

2. Any construction of Section 305 contrary to that consistently followed in its administrative application would ignore the provisions and purposes of the insurance contract, the statute under which it was issued, and the judicial interpretation of these provisions.

The insurance authorized by the statute is against "death or total permanent disability" (Section 400, War Risk Insurance Act, Appendix, *infra,* p. 18), and under the terms of the contract the occurrence of total permanent disability matures the insur-

ance, if in force on that date, dispenses with the payment of premiums, and reduces *pro tanto* the amount of insurance payable at death. See Treasury Bulletin No. 1, Appendix, *infra*, pp. 19–20, and *Boyett* v. *United States*, 86 F. (2d) 66, 68 (C. C. A. 5th). When total permanent disability has occurred the death of an insured cannot mature his contract. As this Court recognized in *United States* v. *Towery*, 306 U. S. 324, 331, rehearing denied, 306 U. S. 668, there is but "*one* critical contingency" which conditions the right to insurance benefits, namely, "the occurrence of permanent total disability or death while the policy remains in force." (Italics ours.) See *Boyett* v. *United States*, *supra*.

There is nothing in Section 305 to indicate an intention on the part of Congress to ignore the provisions of the contract for the maturity of insurance by the single contingency of permanent total disability in those cases in which such disability has occurred. On the contrary, the section provides, as a basis for payment of any benefit authorized therein, that the insurance "shall not be considered as lapsed," and that unpaid premiums are to be deducted from the insurance itself. This conclusive presumption of the continuance, under premium paying conditions, of insurance revived under Section 305 requires the conclusion that it matures and becomes payable, if at all, upon the date of the happening of the contingency against which the insurance is granted, i. e., total permanent disability if it

occurs, or death if total permanent disability does not occur.

Accordingly, in any case in which the insurance lapses at a time when compensation is due and uncollected and the veteran becomes totally permanently disabled, the insurance is revived to the extent made possible by compensation uncollected at that time. But, we submit, if no compensation is uncollected on the date of the first occurrence, in point of time, of one of the two contingencies against which the insurance is granted, no insurance is subject to revival, since the other contingency is no longer insured against. In other words, the sole measure of the insurance revived in any case of total permanent disability is the compensation, if any, uncollected on the date of such total permanent disability.

Moreover, the revival of insurance by compensation accruing to a veteran after he has become totally permanently disabled, would be plainly outside the purpose of Section 305, which is limited to the restoration of insurance in those cases in which, as a possible result of the nonpayment of compensation, a veteran was unable either to avoid the lapse of his insurance or to reinstate it—in other words, the purpose was to do for the veteran what he might have done for himself if the compensation had been paid promptly as it accrued. This purpose was recognized by this Court in *United States* v. *Madigan,* 300 U. S. 500, 504, in which it was stated:

> The legislative history supports the government's argument that from the beginning the aim of the legislation later embodied in § 305 was to permit the veteran to revive his policy when he had allowed it to lapse, for want of funds, at a time when there was money due him from the government for a compensable disability. The supposition was that he would have paid the premiums on the lapsed policy if he had then received the sum due from the government * * *.

Insurance may be reinstated only if a veteran has not become totally permanently disabled. See Section 304 of the World War Veterans' Act (Appendix, *infra*, p. 20). The prompt payment of compensation accruing subsequent to total permanent disability would not, therefore, enable an insured to reinstate his insurance. It follows that the noncollection by an insured of compensation accruing to him after he has become totally permanently disabled, cannot be regarded as having deprived him of the opportunity either to continue or to reinstate his lapsed insurance.

To construe Section 305 as providing a revival of insurance by uncollected compensation accruing after total permanent disability, upon a presumption that the compensation would have been employed by the insured, if paid, to reinstate his insurance would produce an unconscionable result. For such protection is denied a person who, having collected such compensation, should actually seek

to use it for the purpose of reinstating his insurance. The result would be an obviously unwarranted discrimination against the veteran who actually seeks reinstatement in favor of one who never did. Certainly such an intention is not required and should not be imputed to Congress in the interpretation of Section 305.

3. The holding of the Circuit Court of Appeals that the failure of the insured to claim, or of the Government to find, that he was totally permanently disabled during his lifetime precludes a defense based upon the fact of total permanent disability, does not rest upon any provision contained in the World War Veterans' Act.[5] Therefore, if allowed to stand, it would appear to be applicable by analogy to claims against the Government under other statutes.

Presumably the Circuit Court of Appeals considered the Government estopped by the assumed laches of its officials. It is well settled, however, that, in the absence of a statutory provision clearly manifesting an intention to the contrary, public policy requires that the Government be not estopped by the laches or neglect of its officers or agents. *United States* v. *Kirkpatrick*, 9 Wheat. 720, 735–

[5] *United States* v. *Ellison*, 74 F. (2d) 864 (C. C. A. 4th), certiorari denied, 295 U. S. 750, and *United States* v. *Sellers*, 75 F. (2d) 623 (C. C. A. 5th), certiorari denied, 295 U. S. 763, to which the court refers in this connection, rested upon a specific provision of the World War Veterans' Act (Section 205, Appendix, *infra*, p. 21), which, however, clearly has no application to the instant case.

736; *United States* v. *Nashville, &c., R'y Co.*, 118 U. S. 120, 125; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409; *Chesapeake & D. Canal Co.* v. *United States*, 250 U. S. 123, 125; *United States* v. *Wurts*, 303 U. S. 414, 416.[6]

However, we submit that the Government officials were guilty of no undue delay in this case. Section 19 of the World War Veterans' Act (U. S. C., Title 38, Sec. 445) requires, as a condition to the bringing of suit, that a claim be filed in the Veterans' Administration, and that a denial of that claim be obtained. No claim was filed in the Veterans' Administration until June 1931, more than seven years after the death of the insured. This claim was denied in August 1932 (R. 21), slightly more than a year thereafter. This period is not excessive when the large number of claims then pending before the Veterans' Administration is considered.[7]

Furthermore, the determination by the Veterans' Administration that the insured became totally permanently disabled may not be considered as an

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[6] See also *United States v. Loveland*, 25 F. (2) 447 (C. C. A. 3d), error confessed for failure to file a written waiver of jury trial, 278 U. S. 665; *United States* v. *Riggins*, 65 F. (2d) 750 (C. C. A. 9th), rehearing denied July 1933; *United States* v. *Depew*, 100 F. (2d) 725, 728 (C. C. A. 10th).

[7] That the number of then pending claims was large may be inferred from the fact that shortly thereafter suits upon war risk insurance contracts constituted 47.5 percent of the Government's civil litigation. (See Report of the Judicial Conference, September Session, 1934, page 4.)

arbitrary act. It was the duty of the Veterans' Administration to determine the facts in the case in passing upon the respondent's claim. See Section 5 of the World War Veterans' Act (U. S. C., Title 38, Sec. 426). In this connection, it should be noted that, if insurance is revived upon the date of total permanent disability it may be payable to the estate of an insured, whereas, if revived by death it may be payable entirely to a beneficiary, and the amount of the insurance revived may vary markedly according to the facts found. Hence we submit that it was not only within the power of the Veterans' Administration to determine the facts relative to the disability of the insured, but that it was its duty to do so, with no restriction whatever imposed by the fact of the insured's death. There is no basis for assuming that the facts were not correctly determined, and there is, of course, a presumption that official action is properly taken.

4. The importance to the Veterans' Administration of a review of the decision of the court below is indicated by the letter from the Administrator of Veterans' Affairs (Appendix, *infra*, pp. 23–25), in which it is made clear that the statutory construction adopted as the basis for that decision would apply to numerous cases and greatly enlarge the liability of the Government under Section 305, probably by millions of dollars.

5. There is a further question as to the jurisdiction of the Circuit Court of Appeals to have entertained the appeal from the order entered by the District Court, as amended *nunc pro tunc.*

The three counts of the respondent's petition related to a single contract of insurance having a single obligation. Cf. *United States* v. *Towery, supra.* Recovery upon any one of these counts would exclude the possibility of recovery upon any other count. Hence, we submit, they presented inseparable claims, requiring a final adjudication of all of them prior to an appeal from a ruling adverse to the respondent upon any one of them. See *Collins* v. *Metro-Goldwyn Pictures Corp. et al.,* 106 F. (2d) 83, 85 (C. C. A. 2d); *Bowles* v. *Commercial Casualty Ins. Co.,* 107 F. (2d) 169, 170 (C. C. A. 4th); *Jones* v. *St. Paul Fire & Marine Ins. Co.,* 108 F. (2d) 123, 125 (C. C. A. 5th); *Rosenblum* v. *Dingfelder,* 111 F. (2d) 406, 407 (C. C. A. 2d). The order of the District Court in favor of the Government purported to dispose of the third or additional count only, and recited "that the issues presented by the remaining counts * * * remain for disposition" (R. 46).

The holding of the Circuit Court of Appeals that such order was appealable, is based upon its expressed belief that "The counts stated separate causes of action" (R. 43). The contrary view that suits or counts upon a single contract of war risk insurance present a single cause of action because

of the single obligation of that contract has, prior to this decision, been widely held, without question. See *Straw* v. *United States,* 62 F. (2d) 757 (C. C. A. 9th). As a result, in many cases amendments have been permitted to add to the assertion of liability by total permanent disability during the period that an insurance contract remained in force by premium payments, an assertion of liability under Section 305, although an independent suit would have been barred by limitations upon the date of such amendment.

While there is doubt that the judgment of the District Court in the instant case was of such a final character as would give jurisdiction to the Circuit Court of Appeals to review it, the judgment of the latter court constitutes a complete disposition of the case adverse to the Government, the effect of which may be overcome only by the action of this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

JANUARY 1941.